(4)

No. 90-681

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

BARBARA HAFER,

Petitioner

v.

JAMES C. MELO, JR. AND CARL GURLEY, ET AL.,

Respondents

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Is the Auditor General of Pennsylvania, acting within her official capacity in connection with the discharge of employees from the Department of the Auditor General, not a "person" under the Civil Rights Act, 42 U.S.C. §1983, and therefore not subject to civil damage actions instituted under that statute on behalf of the discharged employees?

2. Is not the Auditor General of Pennsylvania, acting within her official capacity in connection with the discharge of employees from the Pennsylvania Department of Auditor General, entitled to the absolute immunity of the Eleventh Amendment to the Constitution of the United States from civil damage actions in the federal courts instituted on behalf of the discharged employees?

LIST OF PARTIES

The proceedings in the United States Court of Appeals for the Third Circuit involved two separate appeals from a single order of the United States District Court for the Eastern District of Pennsylvania which were docketed in the Court of Appeals at 89-1924 and 89-1925. The parties herein who participated in the appeal at 89-1924 included petitioner Barbara Hafer and respondents James C. Melo, Jr., Louise Jurik, Donald Ruggerio, Karol Danowitz, James Dicosimo, Lucille Russell, Walter W. Speelman and John Weikel (Melo respondents). The parties to the appeal at 89-1925 were petitioner Barbara Hafer and respondents Carl Gurley, W. Gerard Best, Michael Brennan, Margaret Casper, Elizabeth Buchmiller, Daniel Clemson, Mary Fager and George A. Franklin, Jr. (Gurley respondents).

James J. West, United States Attorney for the Middle District of Pennsylvania, was a co-appellee with petitioner in the appeal at No. 89-1924. The questions presented herein by the petitioner do not relate to the claims asserted against Mr. West nor to his defenses thereto and James J. West has not been named as a party nor entered an appearance herein.

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit has been reported at 912 F.2d 628, and is reprinted in the Appendix to the Petition for Certiorari herein t p. A1. The Memorandum Opinion of the United States District Court for the Eastern District of Pennsylvania has not been reported. It is reprinted in the Appendix to the Petition for Certiorari at p. A36.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit, vacating the Order dated September 28, 1989, of the United States District Court for the Eastern District of

Pennsylvania granting summary judgment in favor of petitioner Barbara Hafer ("Hafer") was entered on August 21, 1990. Hafer's timely petition to the Court of Appeals for a rehearing before the entire court in banc was denied on September 21, 1990. The Petition for Writ of Certiorari was filed on October 26, 1990, and granted on February 25, 1991. This Court has jurisdiction over this matter under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Constitution of the United States, 11th Amendment.

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

42 U.S.C. §1983. Civil action for deprivation of rights.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

The proceedings in the Court of Appeals arose out of two sets of actions (consisting of eleven separate cases) instituted in the United States District Court for the Eastern District of Pennsylvania by sixteen former employees of the Department of the Auditor General of the Commonwealth of Pennsylvania ("Department"), alleging violations of their civil rights as a result

of their having been discharged by Hafer upon her assuming the office of Auditor General in January 1989. Jurisdiction was based on 42 U.S.C. §§1983, 1985, 1988 and 28 U.S.C. §1343.

Eight of the lawsuits, consolidated in the District Court under the caption, *Melo, et al. v. Hafer and West* (JA 1), involve claims by eight individuals ("Melo respondents") whose employments were terminated by Hafer because of their participation in a job-buying scheme[1] uncovered by the United States Attorney for the Middle District of Pennsylvania, James J. West ("West").

During Hafer's 1988 election campaign as the Republican candidate for the position of Auditor General, she learned from newspaper reports that West had informed the then Auditor General, Donald Bailey ("Bailey"), that an investigation by the FBI had revealed that numerous employees of the Department had been hired or received promotions as a result of pay-offs to senior officials of the Department (JA 65).[2] Immediately following her inauguration on January 17, 1989 (JA 65), Hafer obtained access to the Department's files (JA 68), which included correspondence dated January 21, 1988, from West to Bailey identifying the employees for whose benefit the pay-offs had been made (JA 68, 87-89),[3] FBI summaries relating to the investiga-

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1. Payment of monies to secure public employment or promotion therein is a criminal offense under Pennsylvania law, 18 Pa.C.S. §§4701, 5101, 7322.

2. Although the Melo complaint (JA 10, 13) alleges that Hafer acquired knowledge of the job-buying scheme directly from West as part of a conspiracy between West and Hafer, both Hafer (JA 65-68) and West (JA 238-244) submitted affidavits denying these allegations. In all events, as noted by the Court of Appeals, Hafer's conduct prior to her election was not "state action" prohibited by 42 U.S.C. §1983, and there was no allegation that "Hafer and West conspired . . . after Hafer took office." *Melo v. Hafer*, 912 F.2d 628, 638 (3d Cir. 1990) (A22).

3. Dear Mr. Bailey:

I am in receipt of the letter of January 15, 1988, from your Chief Counsel, Mr. McAneny, requesting "help and advice" concerning the sale of jobs within the administration of your predecessor, Alfred P. Benedict. I have consulted with the Attorney General of Pennsylvania, the relevant agents of the Harrisburg Resident Agency of the Federal Bureau of Investigations, the Internal Revenue Service, and the Pennsylvania Bureau of Criminal Investigations and have their concurrence in making a limited disclosure to you of non-grand jury information. This information will consist of a list of names of

tion (JA 68, 90-110), and the transcripts of interviews of the employees by Bailey's chief counsel, James J. McAneny (JA 68-69, 111-168). Hafer then conducted an independent investigation of the matter (JA 69), including interviews of West, the FBI agents who conducted the federal investigation and John M. Kerr, a major participant in the scheme (JA 62, 69).[4] On February 1, 1989, after reviewing the information in the Department's files or obtained during the Department's investigation, Hafer terminated the employment of eighteen individuals, including the eight Melo respondents, who had been hired or promoted by reason of payments made by them or on their behalf (JA 71-77).[5]

NOTES *(Continued)*

present Auditor General Office employees on whose behalf either Al Benedict or John Kerr have stated they received a payment in exchange for employment at the Pennsylvania Auditor General office.

This list is as follows:

1. Don Ruggerio
2. James C. Melo, Jr. (Promotion)

. . . .

13. Walter Speelman
14. John E. Weikel

. . . .

17. Louise Jurik (Promotion)
18. James Discosimo
19. Karol Danowitz

. . . .

21. Lucille Russell

. . . .

Sincerely,
s/ James J. West
James J. West
United States Attorney

4. John M. Kerr ("Kerr") served as Executive Deputy Auditor General under Pennsylvania Auditor General Alfred P. Benedict ("Benedict") from 1977 to early 1983 (JA 60). On June 29, 1984, after an eleven-day trial, Kerr was found guilty of 139 state criminal charges relating to the scheme and was sentenced to imprisonment for a term of two to five years (JA 60-61). Benedict, Bailey's predecessor, pleaded guilty in January 1988 to federal criminal charges arising out of the job-buying scheme (JA 89, 239).

5. At the time, the Department employed 783 employees (JA 172).

The Melo respondents asserted claims (JA 7-19) against Hafer and West under 42 U.S.C. §1983 for deprivation of the rights of due process and free speech and a conspiracy to deprive them of these rights, and separate state law claims against West alone. The only relief sought by the Melo respondents is monetary; none of the Melo respondents sought to be reinstated in their former positions.[6]

The second group of actions involve an additional eight individuals ("Gurley respondents") who were terminated as part of a management overhaul of the Department. The Gurley respondents were managerial level employees who were replaced by promotions from within the Department (JA 77-78).

These actions were also consolidated in the District Court under the caption, *Gurley, et al. v. Hafer* (JA 3). The Gurley respondents allege claims against Hafer only for deprivation of due process and freedom of speech.[7]

Two of the Gurley respondents (Gurley and Best) seek only damages (JA 26-29, 33-36). Six of the Gurley respondents, who joined in one complaint (JA 37-55), also request reinstatement to their former positions. Their complaint expressly alleges that they claim reinstatement relief from Hafer in her "official capacity" and damages from Hafer in her "personal capacity" (JA 41, 44, 47, 49, 52, 55).

Hafer answered the complaints (JA 20-25, 30-32), raising a number of legal defenses, including in particular the defense that the actions were barred by the Eleventh Amendment to the

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6. Seven of the eight Melo respondents, excepting Melo who was not covered by a union contract, filed grievances contesting their discharge pursuant to the Department's collective bargaining contract (JA 170). After plenary arbitration hearings conducted in accordance with the grievance procedures of this contract, each of the seven respondents has been reinstated.

7. The claims by both groups of respondents for deprivation of freedom of speech are based on their allegations that they were terminated because of their political affiliation. There is no mention in the personnel files of any of the Melo or Gurley respondents of their political affiliation (JA 171). Hafer was unaware of their political affiliations until the filing of these actions in the District Court in which respondents have claimed to be registered Democrats (JA 72-82).

United States Constitution ("Eleventh Amendment").[8] These defenses were for the most part applicable to both groups of actions and were presented to the District Court by way of a consolidated Motion for Summary Judgment (JA 56), supported by a voluminous appendix containing factual affidavits and documentary exhibits (JA 57-172).[9]

On September 28, 1989, the District Court entered an Order (A35)[10] and Memorandum Opinion (A36), granting Hafer's Motion for Summary Judgment and dismissing both the Melo and Gurley actions.[11] It was the District Court's view that Hafer's actions in discharging the respondents were effected in her *official* capacity as Auditor General of Pennsylvania and that she was not a "person" subject to the provisions of 42 U.S.C. §1983, relying on the recent opinion of this Court in *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 109 S.Ct. 2304 (1989) (A37).[12]

Separate appeals were taken from the District Court's Order by the Melo respondents and the Gurley respondents,

8. *E.g.*, "Plaintiff's claims are barred by the Eleventh Amendment" (JA 24).

9. In the Melo action, West also filed a Motion To Dismiss the Complaint or, in the Alternative, for Summary Judgment ("Motion to Dismiss") and the United States of America filed a motion to be substituted in place of defendant James J. West as to the state law counts.

10. Page references to the Orders and Opinions of the District Court and Court of Appeals preceded by "A" are to the Appendix to Hafer's Petition for Certiorari where they are reproduced.

11. The Order dismissing the Melo action was applicable to both Hafer and West and the District Court denied West's Motion to Dismiss on the grounds of mootness. The District Court did, however, grant the motion of the United States to be substituted as defendant with respect to the state law counts of the Melo complaint and dismissed those counts on the ground that West's conduct in connection with these counts was certified by the United States to have been within the scope of his employment necessitating substitution, 28 U.S.C. §2679(b)(1), and that the United States had not waived its defense of sovereign immunity with respect to the state claims asserted therein, 28 U.S.C. §2680(h) (A42).

12. Although Hafer presented factual material and legal argument addressed to the merits of respondents' substantive claims, the District Court, in view of its decision that 42 U.S.C. §1983 was inapplicable, did not reach these issues.

which appeals were consolidated for argument before the Court of Appeals (JA 4, 6). The appeals were argued before a panel consisting of Judges Dolores K. Sloviter, Edward R. Becker and Walter K. Stapleton on March 16, 1990. On August 21, 1990, the Court of Appeals filed an Opinion, 912 F.2d 628 (3d Cir. 1990) (A1), vacating the Order of the District Court dismissing the claims against Hafer.[13]

The principal basis for the Court's reversal of the District Court's grant of summary judgment[14] in favor of Hafer as to *all*

13. The Court further vacated the District Court's dismissal of the state law claims as to West and remanded for evaluation by the District Court of the United States' certification that West's conduct was within the scope of his employment (912 F.2d at 639-42; A23-A31). The dismissal of the civil rights action against West was affirmed, however, on the ground that the civil rights conspiracy alleged by the Melo respondents, which occurred prior to Hafer being elected Auditor General of Pennsylvania, was insufficient to impose liability against West, a non-state actor, under 42 U.S.C. §1983 (912 F.2d at 637-39; A20-A23).

14. Although the Court of Appeals treated the District Court's decision, for scope of review purposes, as a dismissal of the pleadings rather than as a grant of summary judgment (912 F.2d at 633-34; A10-A13), the matter was submitted to the District Court, pursuant to the Court's direction (JA 1, 3), in connection with Hafer's Motion for Summary Judgment, and the District Court expressly stated that it was granting summary judgment in Hafer's favor (A35). Hafer and her attorneys spent considerable time, effort and expense in gathering factual material relating to Hafer's defenses as to the merits of respondents' claims, and respondents were *not* prevented from taking discovery concerning these matters or from requesting additional time in accordance with Fed.R.Civ.P. 56(f). Although asserting a lack of discovery as a reason for not answering Hafer's contentions on the merits in their brief in the District Court, respondents utterly failed to conform to the requirements of Rule 56(f) and therefore waived the right to challenge the entry of summary judgment on that ground. The Declaration of James C. Melo, Jr. (JA 245-246) relied upon by respondents and by the Court of Appeals (912 F.2d at 634; A12-A13), was attached as an exhibit only to the Melo respondents' answer to West's Motion to Dismiss, and was not referred to in their response to Hafer's Motion for Summary Judgment and, in all events, was limited to Melo's lack of information concerning the alleged communications between Hafer and West prior to Hafer's election as Auditor General. The Declaration did not assert need for additional discovery with respect to the official nature of Hafer's actions in discharging the respondents or as to the merits of respondents' claims. The Court of Appeals' refusal even to consider the factual presentation made by Hafer in support of her Motion for Summary Judgment is contrary to a number

of the respondents is that one of the complaints, joined in by *only six* of the eight Gurley respondents, expressly asserted claims for monetary damages against Hafer in her "personal capacity" and that state officials *sued* in their personal capacities are subject to liability for damages[15] under 42 U.S.C. §1983 and are not entitled to the immunity afforded by the Eleventh Amendment. 912 F.2d at 634-37 (A13-A19). In so holding, the Court of Appeals rejected Hafer's contention that, in discharging respondents, she was *acting* in her official capacity pursuant to employment policies established by her as the elected head of the Department. 912 F.2d at 636-37 (A17-A18).

SUMMARY OF ARGUMENT

This Court, in *Will v. Michigan Dept. of State Police, supra*, expressly held that "neither a state nor its officials *acting in their official capacities* are 'persons' under [42 U.S.C.] §1983." 491 U.S. at 71, 109 S.Ct. at 2312. It follows that state officials, acting in their official capacities, have the same status as the State itself, and are absolutely immune from suits for damages in federal court under the Eleventh Amendment.

Hafer, as the elected Auditor General of the Commonwealth of Pennsylvania and as chief executive officer of the

NOTES *(Continued)*

of recent decisions by the Court of Appeals enforcing the requirements of Rule 56(f). *See, e.g.*, Dowling v. City of Philadelphia, 855 F.2d 136, 139-40 (3d Cir. 1988); Hancock Industries v. Schaeffer, 811 F.2d 225, 229-30 (3d Cir. 1987). The Court could and should have reviewed the factual material to determine whether the District Court's grant of summary judgment was sustainable on the lack of merit of respondents' claims with respect to the alleged deprivation of due process and free speech.

15. The Court of Appeals also held that the District Court erred in dismissing the combined complaint of the six Gurley respondents who also sought reinstatement on the ground that state officers may be sued under 42 U.S.C. §1983 in their official capacities for prospective relief. 912 F.2d at 635-36 (A15). Because of the obvious inconsistency involved in asserting claims against a state officer in both capacities, "official" and "personal", the six Gurley respondents seeking reinstatement, as well as damages, have not emphasized the differences in their legal position from that of the other respondents, but have joined in the respondents' principal argument that their action was against Hafer in her personal, not official, capacity.

Department, is invested with full authority to hire and fire employees of the Department. She was therefore *acting in her official capacity* in discharging the respondents and is not subject to a damage action under 42 U.S.C. §1983 both as a matter of statutory construction and by application of the Eleventh Amendment.

The decision of the Court of Appeals for the Third Circuit that Hafer may be *sued in her "personal"* capacity for damages under 42 U.S.C. §1983 *for conduct admittedly performed in her official* capacity is contrary to the explicit holding in *Will*. Further, it is not supported by the prior opinions of this Court.

The Court of Appeals, by permitting Hafer, an elected state executive officer, to be subject to damage liability for acts conducted both within the scope of her authority and in connection with the internal management of the Department has impinged upon the concepts of federalism implicit in the restrictions of the Eleventh Amendment. The jurisdictional rule adopted by the Court of Appeals, which authorizes a plaintiff to assert a civil rights damage claim against an elected state officer in the officer's personal capacity, without regard to the nature of the officer's acts, will have a chilling effect upon the exercise by state officials of their authority and responsibility to manage the affairs of state government in an efficient and orderly manner.

ARGUMENT

HAFER, IN TERMINATING THE RESPONDENTS, WAS ACTING IN HER OFFICIAL CAPACITY AS AUDITOR GENERAL OF PENNSYLVANIA AND IS NOT SUBJECT TO SUIT FOR DAMAGES UNDER 42 U.S.C. §1983. MOREOVER, THE CLAIMS AGAINST HAFER IN HER OFFICIAL CAPACITY ARE BARRED BY THE ELEVENTH AMENDMENT.

I. Under This Court's Opinion in *Will v. Michigan Dept. of State Police*, a State Officer Acting in the Officer's Official Capacity Is Not a Person Under 42 U.S.C. §1983 and Is Immune From Liability Under the Eleventh Amendment.

It is undisputed that, absent waiver by the State or congressional abrogation, the Eleventh Amendment bars a damage action against a State in federal court. *Kentucky v. Graham*, 473 U.S. 159, 169, 105 S.Ct. 3099, 3107 (1985). The Amendment also bars damage suits against a state officer in his or her official capacity because "a judgment against a public servant in his official capacity imposes liability on the entity that he represents." *Id.*, quoting *Brandon v. Holt*, 469 U.S. 464, 471, 105 S.Ct. 873, 878 (1985). Moreover, this Court, in a recent decision, has further held that a State or a state official, in that person's official capacity, cannot be sued in any court for damages under 42 U.S.C. §1983, because they are not "persons" subject to liability under the statute. *Will v. Michigan Dept. of State Police, supra*.

A state officer may, however, be subject to liability for damages for acts committed in his personal capacity, *Kentucky v. Graham, supra*, 473 U.S. at 165, 105 S.Ct. at 3105, and is subject to an action against him in his official capacity to secure prospective relief from alleged violation of rights protected by federal law, *Will v. Michigan Dept. of State Police, supra*, 491 U.S. at 71 n. 10, 109 S.Ct. at 2311-12 n. 10; *Kentucky v. Graham, supra*, 473 U.S. at 167 n. 14, 105 S.Ct. at 3106 n. 14; *Ex parte Young*, 209 U.S. 123, 159-60, 28 S.Ct. 441, 453-54 (1908).

This Court has on several occasions discussed the distinction between personal capacity[16] and official capacity suits in connection with various issues. *See, e.g., Kentucky v. Graham, supra* (liability of state for fees under 42 U.S.C. §1988, where state officer sued in personal capacity); *Brandon v. Holt, supra* (liability of city for acts of city officer sued in official capacity). The elements of each type of action were summarized in *Kentucky v. Graham, supra*, as follows (473 U.S. at 166, 105 S.Ct. at 3105):

> On the merits, to establish personal liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right. . . . More is required in an official-capacity action, however, for a governmental entity is liable under § 1983 only when the entity itself is a "moving force" behind the deprivation . . .; thus, in an official-capacity suit the entity's "policy or custom" must have played a part in the violation of federal law. (Citations omitted).

Although the decision in *Kentucky v. Graham* purported to define more clearly the differences between the two forms of action, it did not consider the question presented herein, whether a state officer may be sued in his personal capacity for acts performed in the officer's official capacity. Prior to this Court's opinion in *Will v. Michigan Dept. of State Police, supra*, the lower federal courts reached conflicting conclusions on this issue.[17] This disparity in the federal decisions was apparently

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16. As this Court noted in Kentucky v. Graham, *supra*, 473 U.S. at 165 n. 10, 105 S.Ct. 3105 n. 10, "personal capacity actions are sometimes referred to as individual capacity actions."

17. *Compare* cases holding that a personal capacity action could not be asserted for acts in the state officer's official capacity, Rodriguez v. James, 823 F.2d 8 (2d Cir. 1987); Jones v. Smith, 784 F.2d 149 (2d Cir. 1986); Beehler v. Jeffes, 664 F.Supp. 931, 943 n. 20 (M.D. Pa. 1986); Lewis v. Kelchner, 658 F.Supp. 358, 361-62 (M.D. Pa. 1986), *with* cases holding that a personal capacity action could be so asserted, Farid v. Smith, 850 F.2d 917, 921 (2d Cir. 1988); Shockley v. Jones, 823 F.2d 1068, 1071 (7th Cir. 1987). *See also* Meadows v. Indiana, 854 F.2d 1068 (7th Cir. 1988); Kolar v. County of Sangamon, 756 F.2d 564, 568 (7th Cir. 1985), in which the court presumed that the action was against the state officers in their official capacity where there was no allegation of personal capacity.

resolved by this Court in *Will v. Michigan Dept. of State Police, supra*.

In *Will*, a state employee brought an action under 42 U.S.C. §1983 in the Michigan state courts against the Michigan Department of State Police and its director, alleging that he had been denied a promotion for an improper reason in violation of his civil rights. The Eleventh Amendment does not bar actions instituted in the state courts, and at the time there was a conflict in the federal and state courts as to susceptibility of States and state officers to a damage action under 42 U.S.C. §1983 in the state courts. The Michigan Supreme Court held that neither the State, acting through its Department of Police, nor the Director of State Police, acting in his official capacity, were "persons" under §1983, and they were therefore not subject to liability for damages under that statute in the state courts.

That decision was affirmed by this Court as to both the State and the Director of State Police. In extending its ruling to the Director, this Court stated as follows (491 U.S. at 71, 109 S.Ct. at 2311-12):

> Obviously, state officials literally are persons. But a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. . . . . As such, it is no different from a suit against the State itself. . . . We see no reason to adopt a different rule in the present context, *particularly when such a rule would allow petitioner to circumvent congressional intent by a mere pleading device*.
>
> *We hold* that neither a State nor its officials *acting in their official capacities* are "persons" under §1983. The judgment of the Michigan Supreme Court is affirmed. (Citations and footnotes omitted; emphasis added).

It is obvious that this determination is equally applicable to bar a damage suit against a state official in the federal courts as well as in the state courts. In concluding that 42 U.S.C. §1983 does not authorize actions against States in state courts, the Court was largely influenced by the limitations upon such

actions in the federal courts imposed by the Eleventh Amendment. *Will*, 491 U.S. at 66-67, 109 S.Ct. at 2309.[18] Moreover, the Court's construction of the statutory term "persons" to exclude state officials *acting* in their official capacities cannot be limited to state court actions and must be applied with equal effect to civil rights actions commenced in the federal courts.

It appears from the Court's use of the term "*acting* in their official capacities," rather than "*sued* in their official capacities," that the Court has concluded that a state officer may not be sued in his personal capacity under 42 U.S.C. §1983 for acts committed in the performance of the officer's official state duties. In other words, it is the conduct itself which is important to the determination whether the action is against the individual in his "official" or "personal" capacity, *not* the plaintiff 's characterization of that capacity.

That this is the effect of the Court's decision in *Will* has already been recognized by the Court of Appeals for the Sixth Circuit in *Rice v. Ohio Dept. of Transp.*, 887 F.2d 716 (6th Cir. 1989). Rice involved an action under 42 U.S.C. §1983 by a state employee against his departmental employer, the State Department of Transportation, and the director and deputy director thereof, for damages incurred as a result of plaintiff's being passed over for promotion for alleged improper reasons. In affirming the grant of summary judgment in favor of defendants, the Sixth Circuit held that the state officials, having *acted* in their official capacities in connection with plaintiff's promotion, were not "persons" subject to liability under 42 U.S.C. §1983, notwithstanding plaintiff's allegation of "personal capacity" (887 F.2d at 718-19):

> Insofar as the director and deputy director were acting in their official capacities, it is now clear that they, like the state itself, were not "persons" within the meaning of § 1983 [quoting *Will*]. . . .

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18. "[I]n deciphering Congressional intent as to the scope of §1983, the scope of the Eleventh Amendment is a consideration, and we decline to adopt a reading of §1983 that disregards it."

> Although the complaint filed by Mr. Rice alleges at one point that the individual defendants were acting both "in their official and personal capacities," the record does not suggest in any way that the defendants' actions were somehow unofficial. *The capacity in which the individual defendants were in fact acting is what matters, not the capacity in which they were sued;* congressional intent is not to be circumvented *Will* says "by a mere pleading device". . . . (Emphasis added).

See also Cowan v. University of Louisville School of Medicine, 900 F.2d 936 (6th Cir. 1990) (action by former medical student against state medical school officials for alleged wrongful dismissal); *Nix v. Norman*, 879 F.2d 429 (8th Cir. 1989) (action by state employee against director of state agency for alleged wrongful discharge).

This conclusion[19] as to the holding in *Will* follows from the express language used by the Court. It is certainly applicable to the conduct of Hafer which is the subject matter of the instant action.

There is no question that Hafer was acting in her official capacity in discharging the respondents. The Court of Appeals expressly acknowledged that "Hafer, the head of the Department . . . is vested under state law with authority to hire and fire employees in the Department. . . ." (912 F.2d at 636 n. 8; A17 n. 8).[20] A fuller discussion of the nature of Hafer's acts is set

19. There are federal courts, including the Court of Appeals for the Third Circuit in the instant matter, which, subsequent to the issuance of this Court's opinion in Will, have strained to ignore the plain language thereof and continue to hold that state officers may be subject to a damage action under 42 U.S.C. §1983 for acts committed in their official capacity merely by alleging or otherwise asserting that the officer is being *sued* in the officer's personal capacity. Price v. Akaka, 915 F.2d 469 (9th Cir. 1990) (action against state trustees to enforce provisions of federal law relating to utilization of trust funds); Laidley v. McClain, 914 F.2d 1386 (10th Cir. 1990) (action by employees against district attorney for alleged wrongful discharge). These decisions are contrary to the explicit language of Will. They are, further, not supported by other opinions of this Court or by policy considerations.

20. The Auditor General of Pennsylvania is an elected official under the Pennsylvania Constitution, Pa. Const. Art. IV, §§1, 18, who has been entrusted with the responsibility of insuring that all monies to which the Commonwealth is entitled are deposited in the State Treasury and making certain that the public money is disbursed legally and properly. The Auditor General's functions include auditing, examining and reporting upon claims against the Commonwealth, settling and collecting accounts of Commonwealth officials and acting as a member of the Pennsylvania Board of Finance and Review. 71 Pa.S. §§115, 246; 72 Pa.S. §§401-08, 3941.1-3941.9, 4081-4092, 4341-4431. These functions are carried out by the Auditor General through the Department which was established by the Pennsylvania Legislature as an independent governmental unit. 71 Pa.S. §61. Under Pennsylvania law, the Auditor General is the final decision-maker for the Department, possessing the exclusive right to set policy and make personnel decisions. 71 Pa.S. §66.

forth in the Opinion of the District Court (A40):

> Hafer's removal of plaintiffs from their positions occurred in her role as Auditor General, a constitutional officer under the Pennsylvania Constitution. Pa. Const. art. IV, §18. Although Hafer, as Auditor General, directed the firings, plaintiffs were employees of the Commonwealth, not of Hafer. Their grievances are directed against the impact of the Commonwealth's termination of their employment. *Hafer's power to cause the terminations derived solely from her authority as a state official. Had Hafer been acting in a personal capacity, she would not have been empowered to effectuate the discharges*. . . . If Hafer had not been elected, or if she had not fired plaintiffs, there would not have been a basis for these §1983 causes of action. (Emphasis added; footnote omitted).[21]

21. This determination as to Hafer's authority, as is evident from the District Court's analysis and as this Court has ruled, City of St. Louis v. Praprotnik, 485 U.S. 112, 123-24, 108 S.Ct. 915, 924 (1988), involves a question of state law and respondents have never refuted the basis of Hafer's authority in this respect. To the extent, if any, there is a factual determination relating to Hafer's acts being within her "official" capacity, these facts were fully presented to the District Court in connection with Hafer's Motion for Summary Judgment. The Declaration of James C. Melo, Jr. (JA 245-246), attached to respondents' answer to West's Motion to Dismiss, asserting the need for further discovery was limited to the facts concerning the alleged conspiracy between Hafer and West and respondents fully argued to the District Court their contentions as to the jurisdiction of the Court over Hafer under the Eleventh Amendment and 42 U.S.C. §1983 in opposition to Hafer's Motion for Summary Judgment. There is therefore no reason to resubmit this

II. The Decision of the Court of Appeals for the Third Circuit That Hafer Could Be Sued in Her Personal Capacity for Conduct in Her Official Capacity Is Contrary to the Express Holding in *Will* and Is Not Supported by the Prior Decisions of this Court.

The refusal of the Court of Appeals to accept the plain language of this Court that a state officer is not a person under 42 U.S.C. §1983 in connection with conduct performed in the officer's official capacity is based upon the rationale that a personal capacity action, as well as an official capacity action, may be asserted against a governmental official who acts under color of state law, notwithstanding the circumstances and nature of the act. The defect in this reasoning is that it fails to recognize a distinction between acts of state officials under color of state law which are *outside* of the official's authority or which are *not essential* to the operation of the State government, and acts of state officials which are both *within* the official's authority and *necessary* to the performance of the State's governmental functions, such as the hiring and firing of employees. These latter acts are simply acts of the State which are not subject to damage liability under 42 U.S.C. §1983 by reason of the Eleventh Amendment, as well as this Court's interpretation of that statute in *Will*.

As was stated in *Nix v. Norman, supra*, 879 F.2d at 431:

> Generally, *individual-capacity suits involve actions* taken by governmental agents *outside the scope of their official duties*. *Official-capacity* suits typically involve either allegedly unconstitutional state policies or unconstitutional *actions taken by state agents possessing final authority* over a particular decision. . . . (Emphasis added).

The decisions of this Court cited by the Court of Appeals in support of its contrary conclusion (912 F.2d at 637; A18) simply do not meet the issue and certainly do not hold that a personal capacity action may be brought against a state officer for conduct

NOTES *(Continued)*
question to the District Court for the development of an additional record relating thereto. Nix v. Norman, 879 F.2d 429, 432 (8th Cir. 1989).

within the officer's authority and in performance of a governmental function. The six limited immunity cases recited in the Court of Appeals' Opinion, for example, either involve acts outside the state officer's authority, *Malley v. Briggs*, 475 U.S. 335, 106 S.Ct. 1092 (1986) (suit by arrestee against state trooper for wrongful arrest); *Tower v. Glover*, 467 U.S. 914, 104 S.Ct. 2820 (1984) (suit by clients against public defenders who allegedly conspired with state officials); *Procunier v. Navarette*, 434 U.S. 555, 98 S.Ct. 855 (1978) (suit by prisoner against state prison officials for negligent interference with mail), or involve holdings that the state officer was entitled to either a qualified or absolute immunity so that the issue of official/personal capacity was not considered, *Davis v. Scherer*, 468 U.S. 183, 104 S.Ct. 3012 (1984) (suit by employee against state officer for wrongful discharge); *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984 (1976) (suit by former prisoner against state prosecuting attorney).

Brandon v. Holt, 469 U.S. 464, 105 S.Ct. 873 (1985) and *Owen v. City of Independence*, 445 U.S. 622, 100 S.Ct. 1398 (1980), do not even concern the liability of state officers. In *Brandon*, the Court merely concluded that an action initially instituted, prior to the decision in *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 98 S.Ct. 2018 (1978), against a city's director of police in his personal capacity for policies established in his official capacity was in fact tried, subsequent to *Monell*, as an official capacity action against the city, and the city, not the director of police, was liable for plaintiff's damages. Similarly, in *Owen v. City of Independence, supra*, the Court held that a city was not entitled to avoid liability for acts of a city officer on the ground of qualified immunity.[22]

22. The decision of the Court of Appeals is also not supported by the legislative history of Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, the precursor of 42 U.S.C. §1983. This Court has on several occasions delved deeply into that history in an attempt to glean the meaning of the term "person" as applied to governmental entities. Monroe v. Pape, 365 U.S. 167, 171-87, 81 S.Ct. 473, 475-84 (1961); Monell v. New York City Dept. of Social Services, 436 U.S. 658, 665-89, 98 S.Ct. 2018, 2022-35 (1978); Will v. Michigan Dept. of State Police, 491 U.S. 58, 68, 109 S.Ct. 2304, 2310 (1989).

The Court's reference in *Brandon* to the "course of the proceedings," rather than to the pleadings, as governing the determination of the type of action, must be read in light of the peculiar timing of that case, having been instituted when the city could not be subject to liability and tried after it could be. That decision cannot be relied upon, as the Court of Appeals (912 F.2d at 635; A15) and respondents have, as supporting the conclusion that it is the plaintiff 's characterization of the case during the proceedings, not the nature of the conduct, which governs the determination whether the action is in a state officer's personal capacity. To permit the plaintiff to control the form of action, either by pleading or otherwise asserting "personal capacity," is contrary to the admonition of this Court in *Will* that the immunity of a state officer from liability for damages for acts performed in the officer's official capacity should not be circumvented by a mere pleading device. 109 S.Ct. at 2311.

As previously noted, only six of the sixteen respondents expressly alleged that they were suing Hafer for damages in her personal capacity and the remaining respondents have never sought leave to amend their complaints to assert personal conduct. That failure by ten of the respondents to allege *personal* capacity is sufficient to justify the conclusion that their actions were against Hafer in her *official* capacity. *Wells v. Brown*, 891 F.2d 591, 593 (6th Cir. 1989).

NOTES *(Continued)*

As this Court has noted, although the debate relating to the 1871 Act was vigorous, Will, 491 U.S. at 68, 109 S.Ct. at 2310, it mainly concerned the other sections of the statute, not Section 1, which was subject to only limited debate and was passed without amendment. Monell, 436 U.S. at 665, 98 S.Ct. at 2023. The complaints referred to in Will to the effect that Section 1 would subject state officers to damage liability, Cong. Globe, 42d Cong., 1st Sess. 366, 385 (1871), were expressed by opponents to the legislation (William Barker, Dem. Ky.; Joseph H. Lewis, Dem. Ky.), and in all events do not state the circumstances under which liability could be imposed.

III. Hafer Should Not, as a Matter of Policy, Be Subject to Liability for Damages Under 42 U.S.C. §1983 for Exercising Her Responsibility Under State Law To Hire and Fire Employees.

The decision of the Court of Appeals that Hafer is liable for damages for exercising her official duties in hiring and discharging employees also contravenes one of the principal purposes of the Eleventh Amendment, *i.e.*, to preserve the sovereignty of the States by restricting the exercise of federal judicial power over the States and state officials. *Employees of the Dept. of Public Health and Welfare v. Missouri Dept. of Public Health and Welfare*, 411 U.S. 279, 287, 293-94, 93 S.Ct. 1614, 1619, 1622-23 (1973) (Marshall, J., concurring); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 88, 99-100, 104 S.Ct. 900, 907 (1987). These considerations of federalism are particularly critical in matters, such as the instant one, arising out of acts taken by an elected executive officer in the operation of the State's governmental affairs. Certainly the hiring and firing of employees is an integral part of the operation of a state government and that function can only be performed by the elected and appointed state officials responsible for those functions.

When state officers are *sued* in their *personal* capacity for *acts* taken in their *official* capacity, they are required to undergo heavy expenditures of personal funds to defend their conduct on behalf of the State even though they may prevail on the merits. As a consequence, the possibility that state officers will be required to litigate personal damage claims against themselves in their personal capacity for exercising, on behalf of the State, their official functions necessarily will have a chilling effect upon their good faith efforts to maintain the high standards of employment practices necessary for efficient management and will interfere with the operation of the state governments. It will also have the deleterious effect of discouraging qualified candidates from running for public office or accepting appointment thereto and could cause incumbents to hesitate to exercise their authority to discharge employees even under the egregious circumstances as existed in the instant matter where there is a discovery by the federal authorities of an invidious job-buying

scheme involving employees of the state's governmental unit entrusted with the responsibility of overseeing and safeguarding the receipt and expenditure of state funds.

There is, moreover, no overriding need to penalize a state officer to remedy any alleged deprivation of federal rights which may occur by reason of authorized conduct in the course of internal management of state government. Adequate prospective relief, such as reinstatement, is available under present law in the form of an official capacity action against the state officer. Damages for alleged deprivation of civil rights should be payable, if at all, by the State, *not the official capacity actor*, and Congress has the power to enact legislation limiting the effect of the Eleventh Amendment and expressly providing monetary relief from the State for violation of the Fourteenth Amendment to the United States Constitution, if that remedy is deemed necessary. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S.Ct. 2666 (1976).

CONCLUSION

The judgment of the United States Court of Appeals for the Third Circuit entered August 21, 1990, should be reversed and the matter remanded to the Court of Appeals for affirmance of the Order of the United States District Court for the Eastern District of Pennsylvania, dated September 28, 1989, granting Hafer's Motion for Summary Judgment and dismissing respondents' consolidated actions against Hafer.

Respectfully submitted,

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